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~~No. 06-1180~~

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

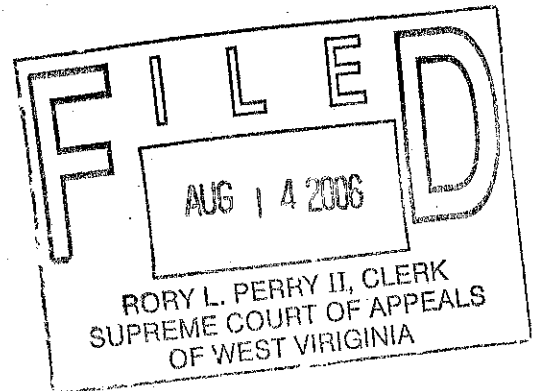
JAMES W. KESSEL, M.D.,
RICHARD M. VAGLIENTI, M.D., and
STANFORD J. HUBER, M.D.,

Petitioners/Plaintiffs Below,

v.

MONONGALIA COUNTY GENERAL HOSPITAL
COMPANY d/b/a MONONGALIA GENERAL
HOSPITAL, a West Virginia Non-Profit Corporation,
MARK BENNETT, M.D., individually,
BENNETT ANESTHESIA
CONSULTANT, P.L.L.C. and
PROFESSIONAL ANESTHESIA SERVICES, INC.,

Respondents/Defendants Below.



**JOINDER OF BENNETT ANESTHESIA CONSULTANTS PLLC AND
MARK BENNETT, M.D. IN RESPONSE BRIEF OF
APPELLEE MONONGALIA COUNTY GENERAL HOSPITAL, INC.**

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I. INTRODUCTION

Bennett Anesthesia Consultants PLLC ("BAC") and Mark Bennett, M.D. join in and incorporate by reference the Brief of Appellee Monongalia County General Hospital, Inc., because the Circuit Court correctly concluded that the exclusive contract between Monongalia General Hospital ("MGH") and Bennett Anesthesia Consultants, P.L.L.C. ("BAC") and the contract between MGH and Professional Anesthesia Services, Inc. (PAS) did not constitute per se violations of the antitrust laws, nor were such contracts an unreasonable restraint of trade under the "rule of reason" test. The Circuit Court correctly found that the contracts did not preclude plaintiffs from practicing their trade and were not "vertical" restraints of trade.

II. DISCUSSION

It is undisputed that Monongalia Anesthesia Associates ("MAA"), an anesthesia group in which each and every Plaintiff was a member, had an exclusive contract with Monongalia General Hospital ("MGH") for many years, and was the exclusive provider of all anesthesia services (except cardiac) until 1999. MGH contacted Dr. Mark Bennett in 1998 to inquire whether he would have any interest in providing anesthesia services at MGH. Discussions regarding anesthesia services between MGH and Dr. Mark Bennett became more serious in the Fall of 1998. Those discussions led to negotiations with BAC,¹ and ultimately led to a contract between BAC and MGH for the exclusive provision of orthopedic anesthesia services. That arms-length contract was executed on or about on December 30, 1998. BAC began performing orthopedic anesthesia services in February of 1999.

¹ Dr. Bennett is the sole member of Bennett Anesthesia Consultants, PLLC.

Thereafter, MGH negotiated exclusively with MAA for the provision of general anesthesia services but could not reach agreement. It was only then that MGH sent RFP's for general anesthesia services to ten anesthesia providers, including MAA and PAS. Eventually, MGH entered into an exclusive contract with PAS to provide anesthesia services at MGH's general operating suites.

The acts of BAC, in entering into a contract with MGH, do not amount to a "per se" violation of anti-trust laws. Plaintiffs have failed to prove that any acts of BAC constitute an unreasonable restraint of trade in violation of West Virginia anti-trust law or any other anti-trust law. Plaintiffs have failed to show that the MGH-BAC contract harmed competition, in any way.

III. CONCLUSION

For the reasons stated herein and for the reasons discussed in the Brief of Appellee Monongalia General Hospital, Inc., which is incorporated herein by reference, both Bennett Anesthesia Consultants, PLLC and Mark Bennett, M.D. respectfully requests that the decision of the Circuit Court be affirmed.

Dated this 14th day of August, 2006.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served the foregoing "Joinder of Bennett Anesthesia Consultants, PLLC and Mark Bennett, M.D. in Response Brief of Appellee Monongalia County General Hospital, Inc." upon all counsel of record both by facsimile and by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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